Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

KENNETH ROSS,
Petitioner,

vs.

CAREAMERICA HEALTH PLANS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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Lodged

Question Presented For Review

A. Should ERISA preemption of State *insurance contract-based* torts under *Pilot Life* apply to a State statutory cause of action prohibiting *pre-contractual* false and misleading advertising by any entity where in passing the underlying statute the State was asserting its traditional police powers in an effort to eliminate predatory business practices in keeping with a Federal study that suggested such legislation would diminish the future likelihood of riots in poor metropolitan areas?

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Citations Of Opinions And Orders

The opinion of the California Court of Appeal for the County of Los Angeles, Second Appellate District, in the matter of *Kenneth Ross v. CareAmerica Health Plans, Inc., et al.*, Second Civil No. B120288, is set forth in Appendix page 1a.

The Order of the California Supreme Court denying Petition for Review dated October 27, 1999 is set forth in Appendix page 18a.

Basis For Jurisdiction In This Court

The California Supreme Court denied Appellant's Petition For Review on October 27, 1999.

There has been no order requesting rehearing or granting an extension of time to file the petition for a writ of certiorari.

This Court has jurisdiction to review the decision of the California Supreme Court on a writ of certiorari pursuant to 28 U.S.C. § 1257(a). In addition, 28 U.S.C. § 2403(b) may apply.

State And Federal Statutes In Question

This case calls into question the interplay between *California Civil Code* § 1750, et seq., also known as "The Consumer Legal Remedies Act" or "CLRA," (set forth at Appendix 19a), which prohibits certain predatory business practices as described below and 29 U.S.C. § 1144, the ERISA preemption statute (Appendix 34a).

Statement Of The Case

Factually, this case arises out of misrepresentations by respondent CareAmerica's ("Respondent") that fraudulently induced the petitioner, Kenneth Ross, to abandon his existing health care plan and join Respondent's.

Legally, this case presents this reviewing Court with the opportunity to further the Madisonian vision of co-sovereign state and federal governments by empowering an otherwise emasculated state government to assert its traditional police powers in an area where it is presently too timid to tread.

The factual background detailed in the Appellant's civil Complaint is as follows:

On or about March 1991, Appellant Ross was employed by Michelson Laboratories. Respondent CareAmerica, through its agents, representatives and/or employees, came to Appellant's place of work for the purposes of marketing, advertising, soliciting, promoting and enrolling Ross into CareAmerica's healthcare plan. (At the time of this presentation, Ross was a member of a competing health care plan, Kaiser Permanente.)

During the presentation, CareAmerica deceptively and misleadingly marketed, advertised, solicited and promoted its plan through oral presentations, advertising brochures and videotapes by stating:

1. CareAmerica provided better *medical services* (as opposed to contract terminology) than Kaiser Permanente;

2. CareAmerica provided the highest form of preventative medicine available;
3. CareAmerica provided the highest form of quality medical services;
4. Mr. Ross would receive all *medically necessary* care in a prompt fashion whenever *recommended by a treating* physician;
5. CareAmerica provided prompt, fair and equitable preapprovals unaffected by monetary considerations;
6. CareAmerica's health care plan had "federal ERISA approval" and that such approval was only "awarded" to those plans which have been proven to offer the best in quality medical services; and
7. CareAmerica did not have any cost containment program which prioritized the maximization of profit over the health of an individual subscriber.

Based upon those representations, Ross terminated his Kaiser Permanente health care plan and enrolled in CareAmerica. Had Ross learned from any source that the actual terms of the CareAmerica's plan differed from the terms of his existing Kaiser plan he would never have become a CareAmerica health care plan participant and would instead have continued with Kaiser Permanente.

On or about September 19, 1995, Ross was clinically examined for hip pain by his treating physician, Vanessa Tatum, M.D. ("Dr. Tatum"). When Ross failed to respond to any conservative

medical treatment, Dr. Tatum requested CareAmerica authorize MRI scans of Ross's hips. CareAmerica refused under the terms of its plan.

Ross continued to experience pain. On at least three occasions between October 1995 and September 1996, Dr. Tatum again requested authorizations to conduct MRI studies. The requests were denied by CareAmerica, again under the terms of its plan.

CareAmerica finally acquiesced to Dr. Tatum's request for MRI studies in September 1996. The resulting MRI film showed advanced degenerative hip disease with a vascular necrosis.

Though the Respondent was within its rights under plan terms to deny authorizations for the MRI in the manner it did, the one year delay caused the Petitioner's medical condition to deteriorate to such a degree that he was required to undergo, and did undergo, double hip replacement surgery, which must be repeated every five years for the remainder of his life. The Petitioner was a young man when he was first diagnosed with reversible degenerative hip disease.

The operative Complaint states that the terms of CareAmerica's health care plan differed from those represented to Ross before he switched from Kaiser, and that the injury occurred by leaving Kaiser and joining CareAmerica's plan. In other words, the injury occurred before the submission of any claims for contract benefits. The Complaint also alleges that had Ross remained with Kaiser, under that plan's terms he would have been diagnosed in time to avoid permanent injury.

Procedural History

The Complaint in this action was filed in September 5, 1997 on behalf of the Petitioner Ross. Respondent CareAmerica Health Plans, Inc., its agent/employee Diane Bullock and plan "gatekeeper" Michael Smith, M.D. were the named defendants.[1]

The Complaint sought compensatory and punitive damages for (1) violation of the Consumer Legal Remedies Act (Civ. Code § 1750 et seq.); (2) intentional infliction of emotional distress; (3) negligent misrepresentation; (4) intentional misrepresentation, and; (5) violation of Civil Code section 3427 (commercial blockade).

On or about November 13, 1997, Respondent filed a demurrer and motion to strike the Complaint. The demurrer was initially set for hearing on January 6, 1998 before the Hon. Arnold H. Gold. After a continuance it was heard on January 20, 1998.

During the demurrer proceedings, the Respondent asserted that each of the Petitioner's claims were preempted by ERISA, as found at 29 U.S.C. §§1001-1461.

The Petitioner opposed the Demurrer on the grounds that pre-contract claims such as those alleged in his Complaint were not preempted by ERISA and that the interpretation of ERISA being urged by the Respondent is unconstitutional.

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[1] Neither Dr. Smith nor Ms. Bullock are parties to this petition.

The trial court sustained the Demurrer in its entirety without leave to amend after finding that each of the Petitioner's claims were preempted by ERISA.

Orders of Dismissal were entered. A notice of appeal from both orders was timely filed.

The Court of Appeal issued a non-published decision affirming the trial court order dismissing the Complaint on July 28, 1999. (Appendix 1a.)

The Petitioner timely filed a Petition for Rehearing on August 4, 1999. The Petition for Rehearing was summarily denied on August 10, 1999.

The Petitioner petitioned the California Supreme Court for review and that petition was denied October 27, 1999. (Appendix 18a.)

Argument In Support Of Petition

I.
Republicanism and Federalism -- Local Versus National Powers.

Police powers are traditionally deemed as local, i.e., public health, safety and welfare. National powers are predominantly economic in nature. *See Printz v. United States* (1997) 521 U.S. 98, 117 S.Ct. 2365, 2375-2377, fn. 9; The Federalist No. 45, p. 293 (C. Rossiter ed. 1961) (J. Madison) (hereinafter "The Federalist").

It necessarily follows that where personal injury is implicated by statute, life interests transcend economic interests and local police powers must predominate. This notion that police powers are

presumably reserved to the locality stems from common law notions of vicinage and are found embodied in such fundamental authorities as Article III section 2(3) ("The trial of all Crimes . . . shall be by jury; and such Trial shall be held in the State where said Crimes shall have been committed"). *See also Constitution of the United States of America* 1419 (J. Killian and G. Costello eds. 1992); 4 W. Blackstone *Commentaries on the Laws of England* 350-351 (T. Cooley 4th ed. 1899).

This case presents overreaching by the Federal government to such extent that co-sovereign California is visibly emasculated, undermining a critical check that the Founders believed critical in fending off the perpetual threat of tyranny from an overly powerful ruler.

In considering a trial court decision to sustain a demurrer based on ERISA preemption, the California Court of Appeal acknowledged that the operative Complaint alleges (1) claims for fraudulent or deceptive pre-contractual advertising and (2) that misrepresenting the quality of *diagnostic* medical services is unrelated to the administration of ERISA *contract* benefits. Even so, the appellate court would not accept that characterization. Instead, it felt duty-bound to re-characterize the gravamen of the Complaint as "delay in the dispensing of plan benefits – slow delivery of *CareAmerica's diagnostic* services," and then proceeded to pronounce:

"The harm appellant has suffered lies in the quality of the administration of plan benefits. Were we to allow this case to go forward, any employee benefit plan participant could find an exception to the ERISA

requirements simply by alleging that he or she would not have enrolled but for the misrepresentation of the quality of the plan's benefits. We may not permit this circumvention of ERISA." Appendix 9a.

Inconsistently, however, the Court of Appeal recognized 10th Amendment police powers reserved constitutionally to the states when observing that "certainly" the states are empowered to enact HMO liability legislation. *Opinion*, p. 11. In addition, Petitioner's lawsuit does not relate to the "misrepresentation of quality of the plan's [contract] benefits," but rather pertains to the providing of substandard *medical* services.

II.
Original Intent Favors Local Powers Be Construed Liberally While National Powers Are Construed As Operative Only Where "*Necessary* and Proper."

"It is incontestible that the Constitution established a system of 'dual sovereignty.' Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' [Citations omitted.]" *Printz v. United States* (1997) 521 U.S. 98, 117 S.Ct. 2365, 2376-2377 (quoting The Federalist No. 39 (J. Madison)).

"As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within

their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.' . . . This separation of the two spheres is one of the Constitution's structural protections of liberty." *Id.* at 2377, 2378 (quoting The Federalist No. 39).[2]

"In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p.323 (J. Madison).

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . .. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292-293 (J. Madison).

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[2] "The opinion of the Federalist has always [been] considered as of great authority." *Cohens v. Virginia* (1821) 19 U.S. 264, 418, 5 L.Ed. 257.

The "power to regulate commerce among the several states", the same power that forms the basis of ERISA, "grew out of the abuse of the power by the *importing* States in taxing the *non-importing*, and was intended as a *negative* and *preventive* provision against injustice *among* the States themselves, rather than as a power to be used for the *positive* purposes of the General Government . . .". James Madison To J.C. Cabell, February 13, 1829: Farrand, ed., *The Records of the Federal Convention of 1787* (revised 1966 reprint edition) Vol. III, Yale University Press, page 478.

"The great object of the Convention" of 1787 in relation to adding the interstate Commerce Clause was to protect the federal government's "power to regulate *foreign* commerce." The primary reason was to prevent states from entering independently into treaties with foreign powers. James Madison to Prof. Davis, 1832: Farrand, ed. *The Records of the Federal Convention of 1787* (revised 1966 reprint edition) Vol. III, Yale Univ. Press, p. 520.

The California Court of Appeal ignored the statement of Federalist 45 that the majority of powers exist in the states even when faced with an interstate commerce power exercised by the federal government. Instead, the Court of Appeal put too much weight, wrongly so, in this Court's decision of *Metropolitan Life Insurance Company v. Massachusetts* (1985) 471 U.S. 424, 439, describing this passage as having such "a broad, common sense meaning" to indicate that even "deceptive pre-contractual advertising" constitutes a "delay in the dispensing of plan benefits", hence

constituting "a connection with or reference to such a plan." (Appendix 8a.)

The California Court of Appeal relies on no other authority than this Court's *Metropolitan* position. Hence, it is up to this Court to clearly delineate the difference between state police power prohibiting deceptive advertising and the administration of contract benefits, since the former temporally pre-dates the formation of any contract (and, in fact, this statutory tort can be stated even if a contract is never later formed), while the latter requires a contract to be formed in the first place in order to thereby administer ERISA plan benefits.

Once this Court provides sufficient guidance to the State Courts so that they may recognize their state police powers without intimidation or ambiguity, this Court may then order that plaintiff's case be returned to State Court for the purpose of litigating only false and misleading pre-contractual advertising claims.

III.
States Must Be Freed To Appropriately Exercise Their Traditional Police Powers.

As noted above, the California Court of Appeal stated in its opinion, "Were we to allow this case to go forward, any employee benefit plan participant could find an exception to the ERISA requirements simply by alleging that he or she would not have enrolled but for the misrepresentation of the quality of the plan's benefits. We may not permit this circumvention of ERISA." (Appendix 9a.)

Inconsistently, however, this same appellate court seemed to "permit" the police power understanding that the California Legislature "may elect to constrain an [ERISA] HMO's right to approve and disapprove the provision of medical procedures" (Appendix 14a.)

The Court of Appeal should have addressed this Court's *Metropolitan Life* decision in support of the constitutional power of state legislatures 'to constrain and HMO's right to approve and disapprove the provision of medical procedures" because this Court upheld a state minimum insurance coverage mandate as not being preempted by ERISA. Unfortunately, the Court of Appeal wrongly placed this Court's *Metropolitan Life* decision in support of the inconsistent statement that a "broad, common sense meaning" of "relate to" should mean that "deceptive pre-contractual advertisement" is something that has "a connection with" a "delay in the dispensing of plan benefits."

Future state appellate court opinions will continue to show such inconsistencies, wasting precious judicial resources at both state and federal levels, until this Court gives a clear description of the Framers' intent in recognizing two concurrent sovereignties, state and federal, the former being the primary guard against abuses that cause injury to life, liberty, health, safety, morals, ethics and welfare, both on an individual and public level. California has a greater concentration of managed care entities than any other state in the nation. Its predicament is clearly local in nature. It is for this reason that California has followed the example in Texas by recently enacting California Civil Code

section 3428, entitled "The Managed Health Care Insurance Accountability Act of 1999."

This Court's intervention in *Ross v. CareAmerica* will provide sorely needed guidance through state appellate courts and federal circuits. Agreeing to accept writ of certiori here would complement those issues to be addressed by this Court in another fiduciary duty case currently before this Court, i.e., *Herdrich v. Pegram* (7th Cir.1998) 154 F.3d 362.

Finally on page 12 of its Opinion, the *Ross* Court states that ERISA may leave a gap in the law "if it is the result intended by Congress", relying upon *Howard v. Parisian* (11th Cir. 1987) 807 F.2d 1560, 1565. This is a most dangerous statement because it presumes that our liberties are "given" to us by a Congress turned Parliament, in opposition to our Framers' intent that all liberties are reserved as part of our "birthright" unless specifically and expressly surrendered by positive enumerations of power to state and federal governments. For this reason, the Bill of Rights immediately amended the Constitution to reflect these natural liberty rights. Congress can never leave a "gap" in the protection of liberty even if Congress intended to do so because this is not within the power or discretion of Congress to do. The American citizenry is born with rights to obtain redress of grievance before civil juries for non-consensual injuries to life, liberty and happiness. It is the purpose of government to advance these interests, not to ignore them.

"Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign . . . where the weaker individual is not secured against the violence of the stronger." The Federalist No. 51, p. 324 (J. Madison).

"The operations of the federal government will be most extensive and important in times of war and danger; those of the state governments in times of peace and security." The Federalist No. 45, p. 293 (J. Madison).

The federal "government cannot be deemed a *national* one since its jurisdiction extends to certain enumerated objects *only*, and leads to the several States a *residuary and inviolable sovereignty over all other objects*." The Federalist No. 39, p. 245 (J. Madison) (emphasis added). See also *United States v. Lopez* (1995) 514 U.S. 549, 587-589, 115 S.Ct. 1624 (J. Thomas concurring).

The "equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States." The Federalist No. 43, p. 279 (J. Madison) (emphasis added).

This Court has recently recognized the co-sovereignty status of the states in *Alden v. Maine* (1999) 527 U.S. ___, 119 S.Ct. 2240. It should be left to at least one sovereignty to recognize "the Transcendent law of nature and of nature's God, which declares that the *safety and happiness* of society are the *objects* at

which all political institutions aim and to which all such institutions must be sacrificed." The Federalist No. 43, p. 279 (J. Madison) (emphasis added).

Because ERISA does not provide any human-related remedy for a human injury, such as pain and suffering, caused by the denial of medically necessary care, remaining co-sovereign state authority must be allowed to "fill the gap" if "safety and happiness" are truly "objects at which all political institutions [must] aim."

The federal government "is not to be charged with the whole power of making and administering laws (The Federalist No. 14, p. 102 (J. Madison)), because as to the protection of life, liberty and property, state governments possess the greater competency.

Even when exercising "necessary and proper" powers in the execution of enumerated-powers, "the means of execution should be of the most obvious and essential kind; and exerted in the ways as little intrusive as possible on the powers and police of the State." James Madison to Spencer Roane, May 6, 1821, in Rakove, ed. (1999 The Library of America) *James Madison: Writings*, p. 776.

When Congress punishes one group "with the privation of a civil right", such as the right to sue for tort damages denied to all except church and state employees (29 U.S.C. 1003 (b)), "does it not violate justice by at once taking away a right and prohibiting a compensation for it"? James Madison, "Observations on the 'Draft of a Constitution for Virginia'", October 15, 1788, in Rakove, ed. (1999 The Library of America) *James Madison: Writings*, p.412.

After considering whether to give the national government a negative or veto power over state laws, the majority of Framers voted "finally for a limited power without the negative." James Madison to Thomas Jefferson, October 24, 1787, in Rakove, ed. (1999 The Library of America) *James Madison: Writings*, p. 146. Allowing complete preemption under ERISA of all state tort remedies converts our government into one of unlimited power with the possession of a complete negative over all state police power civil jurisdiction.

The primary sources of the Framers' constitutional intent are to be found in notes pertaining to the Federal Convention of 1787 and in the records of the State Ratification Convention. James Madison to James Robertson, March 27, 1831, in Rakove, ed. (1999 The Library of America) *James Madison: Writings*, p. 853.

Two of the four "great objects" in the Federal Convention of 1787 were "2. To draw a line of demarcation which would give to the General Government every power requisite for *general* purposes, and leave to the States *every* power which *might* be most beneficially administered by them; 3. To provide for the different interests of different parts of the union." James Madison to Thomas Jefferson, October 24, 1787, in Rakove, ed. (1999 The Library of America) *James Madison: Writings*, p. 144. Subject to the "superintending care" of the States is "all the more domestic, and personal interests of the people." The Federalist Papers, No. 46, pp. 294-295 (J. Madison).

By recognizing complete preemption of all state tort laws by ERISA, this Court would be merging judicial and legislative powers into one center, ignoring the founding purpose of establishing a system of checks and balances. Hence, "'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*.'" The Federalist No. 47, p. 303 (J. Madison).

The "concentrating [of legislative, executive and judiciary powers] in the same hands is precisely the definition of despotic government." The Federalist No. 49, pp. 310-311 (J. Madison).

The "tendency of republican governments is to an aggrandizement of the legislative, at the expense of the other departments. The appeals to the people therefore would usually be made by the executive and judiciary departments." The Federalist No. 49, pp. 315-316 (J. Madison). "[Judicial] [a]mbition must be made to counteract [legislative] ambition", thereby "supplying, by opposite and rival interests, the defect of better motives." The Federalist No. 51, p. 322 (J. Madison).

"In a free government, the security for civil rights must be the same as for religious rights" in order to prevent tyranny over the "rights of individuals or the minority." The Federalist No. 51, p. 324 (J. Madison).

"As there is a degree of depravity in mankind . . . so there are other qualities in human nature which justify a certain portion of esteem and confidence." Through a system of checks and balances, "republican government presupposes the existence of these qualities

in a higher degree than any other form." The Federalist No. 55, p. 346 (J. Madison). Failure to defer to state tort laws when one with superior resources and power injures another with the wrongful denial of medically necessary care constitutes a redefining of republican government as one which finds acceptable the abuse of economic power even when it results in non-economic human injury.

"If this [freedom] spirit shall ever be so far debased as to tolerate a law not obligatory on the Legislature [i.e., the government employee ERISA exception] as well as on the people, the people will be prepared to tolerate anything but liberty." The Federalist No. 57, p. 353 (J. Madison).

The "equal vote allowed to each state [in the Senate], is at once a constitutional recognition of the portion of *sovereignty* remaining in the individual states and an instrument for *preserving that residuary sovereignty*." The Federalist No. 62, p. 378 (J. Madison). Complete ERISA preemption of state statutory tort claims would ignore this "residuary sovereignty", particularly when ERISA itself does not provide a counterpart tort claim to address injuries caused by the more powerful against the least powerful. An inconstant law "poisons the blessings of liberty itself . . . Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?" The Federalist No. 62, p. 381 (J. Madison).

"It surely does not follow that because [the people] have given the power of making laws to the Legislature, that therefore they should likewise give them power to do every other act of sovereignty by

which the citizens are to be bound and affected." The Federalist No. 64, p. 394 (J. Jay). This further recognizes concurrent state tort powers to address individual injuries caused, for instance, by the wrongful denial of medically necessary care.

"When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests." In relation, "it is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government. . . . The pendency of the legislative authority to absorb every other, has been fully displayed in some preceding numbers." The Federalist No. 71, pp. 432-433 (A. Hamilton) (also referencing the preceding Federalist essays, Nos. 48 and 49).

The primary purpose of the judiciary is to operate as a check against the Legislative body by opposing uncompensated "injury of the private rights of particular classes of citizens by unjust and partial laws." The Federalist No. 78, p. 470 (A. Hamilton).

The California Supreme Court has held that a federal civil rights action for damages under 42 U.S.C.A. section 1984 can be maintained for "deprivation of any rights, privileges, or immunities" arising out of Juvenile Hall's failure to provide adequate medical treatment to a detainee. *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 173-177. California courts have also held that "Federal and State courts in effect have concurrent jurisdiction of torts

based on substantive constitutional guarantees." *Handschuh v. Superior Court* (1985) 166 Cal.App.3d 41, 45. One state appellate court judge has observed that "the State constitutional right to equal protection is self-executing, permitting a cause of action for damages . . . for violations of state constitutional rights." *Gates v. Superior Court (Hirata)* (1995) 32 Cal.App.4th 481, 531 (J. Grignon Dissenting).

One California Supreme Court justice has observed that "there is a growing and ominous trend toward federal preemption of issues that belong within the sphere of control by the individual states." *Commercial Life Insurance Company v. Superior Court* (1988) 47 Cal.3d 473, 490 (J. Mosk dissenting). This confusion between the separation of state and federal powers as caused by *Pilot Light* must be clarified by this Court since state courts appear willing to move away from confederation in favor of consolidation despite the Framers' original intent.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Stated otherwise, "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." The Federalist No. 47, pp. 301, 303 (J. Madison).

When "no barrier was provided between these several powers", it was shown that "the constitutional trial by jury had been violated." Hence, "concentrating these [three powers] in the same hands is precisely the

definition of despotic government." The Federalist No. 48, pp. 310-312 (J. Madison).

"Government is instituted no less for protection of the property than of the persons of individuals." The Federalist No. 54, p. 339 (J. Madison).

"The ingredients which constitute safety in the republican sense are a due dependence on the people and a due responsibility." The Federalist No. 70, p. 424 (A. Hamilton).

"The ordinary administration of criminal and civil justice . . . is the most powerful, most universal and most attractive source of popular obedience and attachment." The Federalist No. 17, p. 120 (A. Hamilton).

The federal government will no longer be a source of popular attachment if its ERISA preemption policy is viewed as providing a complete preemption of all state tort laws, thereby denying redress of grievance to those local communities whose members have been injured by false and misleading advertising.

Respectfully submitted,

MAZURSKY, SCHWARTZ & ANGELO

Christopher E. Angelo
William A. Daniels
Counsel of Record
Attorneys for Petitioner
Kenneth Ross

APPENDIX

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Court of Appeal – Second Dist.
FILED
July 28, 1999
Joseph A. Lane, Clerk

_____
Deputy Clerk

KENNETH ROSS,

Plaintiff and Appellant,

v.

CAREAMERICA HEALTH PLANS, INC., et al.,

Defendants and Respondents.

B120288 (Super. Ct. No. BC177483)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arnold H. Gold, Judge. Affirmed.

Mazursky, Schwartz & Angelo, Christopher E. Angelo and Anthony Kornarens for Plaintiff and Appellant.

Horvitz & Levy LLP, Sandra J. Smith, L. Rachel Lerman Helyar, Bonne, Bridges, Mueller, O'Keefe & Nichols, Richard J. Ryan and Nancy L. Flores for Defendant and Respondent CareAmerica Health Plans, Inc.

Reback, Hulbert, McAndrews & Kjar, LLP, Gregory M. Hulbert and Heidi L. Smith for Defendant and Respondent Michael Smith.

Appellant Kenneth Ross appeals after the trial court sustained demurrers without leave to amend and dismissed the complaint on the primary ground of "ERISA" preemption.

FACTS AND PROCEDURAL BACKGROUND

Kenneth Ross (appellant) was employed by Michelson Laboratories (Michelson) in the City of Commerce. Appellant was a member of the Kaiser Permanente health care plan (Kaiser). Representatives of respondent CareAmerica Health Plans, Inc. (CareAmerica) came to appellant's place of work in March 1991 for the purpose of marketing, soliciting, and enrolling employees of Michelson. CareAmerica's representatives, including defendant Diane Bullock and others, made oral presentations supplemented with advertising brochures, videotapes, and other promotional materials soliciting membership in CareAmerica's health care plan.

CareAmerica promotions claimed that CareAmerica provided better medical services than Kaiser, including touting CareAmerica's diagnostic services as the highest quality preventative medicine available. CareAmerica asserted that its prevention services included regular use of diagnostic tests. The CareAmerica promotion informed appellant that he would promptly receive all medically necessary care whenever a treating physician so recommended. CareAmerica represented that it provided prompt, fair, and equitable pre-approvals for treatment and services, unaffected by monetary consideration.

CareAmerica also advertised that its health care plan had "federal ERISA approval" and that such approval was only "awarded" to those plans which had been proven to offer the best quality medical services. CareAmerica also promoted its plan by advertising that it had no cost containment program that prioritized profit maximization over the health of individual subscribers.

Although appellant was happy and satisfied with the service of his Kaiser plan, CareAmerica's representatives encouraged appellant to terminate his Kaiser enrollment and subscribe to CareAmerica's plan. Based upon the CareAmerica's advertising and promotional claims, appellant in March 1991 terminated his Kaiser enrollment and subscribed to the CareAmerica plan. Appellant was not then aware that the terms of the plan differed from those CareAmerica had advertised and promoted.

After a fall into a pool, appellant suffered pain in his right hip for one month. Then on September 27,

1995, appellant was treated by Dr. Vanessa Tatum, a CareAmerica health care provider. X-rays of appellant's hips and pelvis were reported as normal. Dr. Tatum treated appellant with "non-steroidal anti-inflammatory medications, muscle relaxants[,] and a pain medication, Vicodin." Appellant's pain persisted despite this treatment, and during October and November appellant was examined by orthopedists, Drs. Stern and Kanter. Dr. Stern requested magnetic resonance imaging (MRI) testing but respondents (CareAmerica and its agents) denied the request, as they did subsequent requests.

Appellant's pain mounted and became unbearable. Respondents subsequently authorized an MRI study, which was conducted on September 6, 1996. The MRI films indicated "bilateral avascular necrosis." X-rays in July 1996 had indicated that appellant had advanced osteoarthritis of the right hip and less severe osteoarthritis of the left hip.

Appellant had to undergo a total artificial double hip implantation with the prospect of double hip surgery every five years for the remainder of his life. Along with the foreboding prospect of repetitious surgery, appellant suffers excruciating physical pains, susceptibility to serious falls while negotiating stairs, and has mental and nervous pain. Appellant has also sustained loss of earnings and decreased earning capacity with a likelihood of permanent disability.

It was Dr. Tatum's opinion that there had been no medically reasonable explanation for refusal of the MRI tests and that denial of the MRI diagnostic study

necessitated the bilateral hip replacement and implantation.

Respondent Michael Smith, M.D. (Dr. Smith) was the CareAmerica licensed physician who refused to authorize the MRI studies.

Appellant then filed a complaint against defendants, including respondents CareAmerica and Dr. Smith. The complaint alleges causes of action for (1) violation of Civil Code section 1750 et seq. (Consumer Legal Remedies Act or "CLRA"), (2) intentional infliction of emotional distress, (3) negligent misrepresentation, (4) intentional misrepresentation, and (5) violation of Civil Code section 3427 ("commercial blockade"). Respondents demurred to the complaint, contending in part that the entire complaint and each of its causes of action fail to state a claim for relief because the federal Employee Retirement Income Security Act of 1974 (ERISA) limits plaintiff to suing the employee benefits plan for unpaid benefits.

The trial court sustained respondents' demurrers without leave to amend on the basis that each of the causes of action was preempted by ERISA. Thereafter, the trial court dismissed the actions against respondents. The remaining defendants named in the complaint were voluntarily dismissed.

CONTENTIONS

Appellant contends that (1) there is no ERISA preemption because "the gravamen of the complaint alleges fraudulent misconduct in misrepresenting the

terms and conditions of the plan for purposes of inducing appellant to switch healthcare plans" and (2) the trial court's interpretation of ERISA is unconstitutional.

DISCUSSION

I. Standard of Review

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 828.) The court does "not, however, assume the truth of contentions, deductions, or conclusions of fact or law." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The judgment "must be affirmed if any one of the several grounds of demurrer is well taken. [Citations.]" (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 21.)

We review de novo an order sustaining a demurrer, exercising our independent judgment about whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California, supra*, 51 Cal.3d 120, 125.) We are not bound by the trial court's interpretation of statutory law. Rather, we independently construe questions of law. (*California Teachers Assn. V. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.)

II. ERISA Preemption

"ERISA is a comprehensive federal law designed to promote the interests of employees and their beneficiaries in employee pension and benefit plans. (*Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 90.) As a part of this integrated regulatory system, Congress enacted various safeguards to preclude abuse and to secure the rights and expectations that ERISA brought into being. (29 U.S.C. § 1001; see also Sen. Rep. No. 93-127, 1st Sess., p. 36 (1973).) Prominent among these safeguards is an expansive preemption provision, found at section 514 of ERISA (29 U.S.C. § 1144; *Ingersoll-Rand V. McClendon* (1990) 498 U.S. 133, ___; *Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co.* (1991) 53 Cal.3d 1041, 1047.) [¶] ERISA's preemption clause is conspicuous for its breadth, establishing as an area of exclusive federal concern the subject of every State law that 'relates to' an employee benefit plan governed by ERISA. (*FMC Corp. v. Holliday* (1990) 498 U.S. 52, ___.) ERISA preempts 'any and all State laws insofar as they . . . relate to any employee benefit plan,' except laws 'which regulate insurance . . . .' (29 U.S.C. § 1144(a),(b)(2)(A).)" (*Marshall v. Bankers Life & Casualty Co.* (1992) 2 Cal.4th 1045, 1050-1051.)

ERISA provisions permit a "participant or beneficiary" to enforce his or her rights and benefits under an ERISA plan by bringing a civil enforcement action in either federal or state court against an employee benefit plan, an ERISA plan, as a legal entity. ERISA provides specific remedies and allows the award of attorney fees. (29 U.S.C. § 1132.)

As described by the California Supreme Court in *Marshall, supra*, 2 Cal.4th 1045, ERISA general preempts state law and state actions that "relate to" an ERISA benefit plan such as CareAmerica.[3] As stated above, the United States Supreme Court has given a broad construction respecting ERISA's preemptive effect on state law and state actions. (*Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. 85.) The Supreme Court has given the key statutory phrase "relate to" a broad, common sense meaning and found that a state law relates to an ERISA plan "'if it has a connection with or reference to such a plan.'" (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 739.)

In our case, there is much more than a mere connection or reference to CareAmerica's benefit plan. Indeed, the gravamen of appellant's complaint is not, as appellant contends, fraud or deceptive pre-contractual advertising, but delay in the dispensing of plan benefits

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[3] Title 29 United States Code, section 1144(a). This preemption clause provides: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." The parties have not disputed that CareAmerica is an ERISA plan and that appellant is a "participant or beneficiary." In his reply brief, appellant for the first time raises the question whether CareAmerica is an ERISA plan. Having failed to raise the issue in his opening brief, appellant has waived it.

– slow delivery of CareAmerica's diagnostic services. The harm appellant has suffered lies in the quality of the administration of plan benefits. Were we to allow this case to go forward, any employee benefit plan participant could find an exception to the ERISA requirements simply by alleging that he or she would not have enrolled but for the misrepresentation of the quality of the plan's benefits. We may not permit this circumvention of ERISA.

The Supreme Court has found preemption where a plaintiff has pursued causes of action seemingly based on tort or other common law principles. In *Ingersoll-Rand Co. v. McClendon, supra*, 498 U.S. 133, the Supreme Court found that ERISA preempted a state wrongful discharge claim by an employee alleging that termination was designed to prevent him from receiving benefits under covered plan. In *Pilot Life Ins. Co. v. Dedeaux* (1987) 481 U.S. 41, the high court held that ERISA preempts state tort and breach of contract claims by a plan participant alleging improper processing of benefit claims.

In *Parrino v. FHP, Inc.* (9th Cir. 1998) 146 F.3d 699, the plaintiff through his employer was a participant or beneficiary in an HMO administered by defendant FHP, Inc. Approval of payment for proton beam therapy to treat plaintiff's cancerous brain tumor was initially denied. After a delay the therapy was approved. (*Id.* at p. 702.) The plaintiff filed "causes of action for breach of the implied covenant of good faith and fair dealing and for civil conspiracy . . . both predicated upon alleged defects in FHP's procedures for processing health insurance claims." (*Id.* at pp. 703-

704.) The court of appeals ruled that these claims were "completely preempted by ERISA." (*Id.* at p. 704.) CareAmerica's tardy approval of the MRI in the instant case presents the identical predicate procedural defect that the plaintiff alleged against FHP in *Parrino, supra.* In both cases, the plan's failure to timely approve a medical procedure is alleged to have worsened the medical condition of the plaintiff. It therefore appears that appellant's action is preempted by ERISA.

Appellant relies on several federal cases involving causes of action for fraud in the inducement. These cases are distinguishable. None of these cases concern procedures by which a health care provider dispensed benefits as in the instant matter. Rather, they each present the classic case where the plan's benefits or coverage were misrepresented or the coverage was not provided. Thus, we cannot find that appellant's attempted reliance, for example, on the CLRA is not preempted in this matter by ERISA.[4]

By way of contrast, in *Perry v. P*I*E. Nationwide, Inc.* (6th Cir. 1989) 872 F.2d 157, the federal court of appeals reviewed an employee action against an employer for fraudulent inducement in

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[4] We grant appellant's requests for judicial notice of various historical materials pertaining to the CRLA. However, these are not particularly helpful in this matter. The CRLA was designed to protect consumers, and especially senior citizens, from "bunco sales" and other deceptive business practices in such areas apart from medical care as home improvement construction magazine sales, insurance, psychics, etc.

obtaining participation in an employee benefit plan (a stock incentive plan or "SIP") and sought rescission of plan and restitution of agreed wage reduction. The court held that the employees' claims relating to fraud, misrepresentation, coercion, and promissory estoppel with respect to obtaining their agreement to participate in a benefit plan and to accept an irrevocable pay cut were not preempted by ERISA. The court there noted that the wrongful act occurred before the SIP was established and thus made ERISA inapplicable. (*Id.* at pp. 160-161.)

Here, the principal wrongful act alleged in CareAmerica's failure to approve timely diagnostic procedures, not that the plan proscribed such procedures. The acts complained of occurred after appellant had participated in the plan for several years. Appellant's allegations that CareAmerica fraudulently induced him to switch plans could prevent the application of ERISA only if appellant was deceived about the scope of CareAmerica's coverage. That is not the case despite some of appellant's allegations. Though couched in terms of advertising deception, the facts alleged, rather than appellant's conclusions, clearly manifest that CareAmerica's plan provided the benefits appellant wanted. It is the plan's deficient administration about which appellant complains, i.e., that the plan's benefits were not timely provided.

The employee in *Perkins v. Time Ins. Co.* (5th Cir. 1990) 898 F.2d 470 brought his claim against an employer's insurer and agent who fraudulently induced the employee to surrender coverage under an existing policy in order to participate in a plan governed by

ERISA which did not provide promised coverage. The court of appeals held that ERISA did not preempt the action. Appellant has not substantially alleged that CareAmerica's coverage for the injury he suffered was any less than under his former Kaiser plan. Indeed, he has not alleged his medical condition was not treated. Rather, his claim merely concerns the belated provision of diagnostic procedures where an administrating physician opined that the procedures were unnecessary.

The case of *Morstein v. National Ins. Services, Inc.* (11th Cir. 1996) 93 F.3d 715 likewise provides no assistance to appellant. In *Morstein*, the employer filed a state action against an independent insurance agent for fraudulent inducement to purchase and negligence in processing her application for an ERISA-governed insurance plan. The defendants removed the action to federal court. The court of appeals ruled that the claims did not have sufficient connection with the plan so as to "relate to" the plan and thus did "not fall within ERISA's broad preemptive scope." (*Id.* at p. 724.) The court also focused on the fact that the insurance agent was not an entity subject to ERISA's requirements. (*Id.* at p. 722.)

Appellant also relies on *Camp v. Pacific Financial Group* (C.D. Cal. 1997) 956 F.Supp. 1541, a federal district court case from Los Angeles. This case is even less useful to appellant's cause. In *Camp*, the court observed that "[t]he plaintiffs want this Court to recognize a wrongful inducement to establish an ERISA plan claim under circumstances where the only damages alleged . . . arise from the management and administration of the ERISA plan. This factual

difference between this case and the cases in other circuits is of paramount significance." (*Id.* at p. 1548, fn. omitted.) *Camp* more closely resembles appellant's case than any of the others upon which he relies. From appellant's complaint, it is clear that his damages arise only "from the management and administration" of the plan (*ibid*), and not from CareAmerica's advertising and promotion.

We are therefore persuaded that the trial court correctly determined that appellant's claims "relate to" the management and administration of this ERISA plan and that therefore the causes of action in the complaint are preempted by ERISA.

III. Commercial Blockade

Under a tortured interpretation of Civil Code section 3427.1, appellant claims the trial court deprived him of a valid cause of action for commercial blockade. We find that appellant has not and cannot plead a valid cause of action for commercial blockade.

Civil Code section 3427.2[5] provides for civil damages against those who commit acts prohibited by Civil Code section 3427 et seq. Civil Code section 3427.1 (hereinafter, section 3427.1) describes the "tort of commercial blockade" and makes it unlawful "for a person, alone or in concert with others, to intentionally prevent an individual from entering or exiting a health

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[5] Civil Code section 3427.2 provides: "A person or health care facility aggrieved by the actions prohibited by this title may seek civil damages from those who committed the prohibited acts and those acting in concert with them."

care facility by physically obstructing the individual's passage or by disrupting the normal functioning of a health care facility."

Appellant relies on the last part of section 3427.1 to find an actionable tort. Appellant claims that CareAmerica's actions in refusing to approve the initial MRI requests constitutes "disrupting the normal functioning of a health care facility." The contention is absurd. Approving and disapproving diagnostic procedures is a normal function of all health care providers. A cost-benefit analysis is probably always a part of the approval process. Even if a refusal was medically unreasonable, that refusal does not give rise to a new tort. Health maintenance organization (HMO) members generally have several possible remedies such as medical malpractice and breach of contract. It is readily apparent from the plain language of section 3427.1 that the Legislature had as its purpose to protect health care facilities against disruption by third parties who seek to obstruct physically or otherwise hinder health care providers form performing their daily tasks. The Legislature seems to have contemplated interference through boycotts, sit-ins, or other disturbances.

Certainly an HMO that improperly refuses to authorize medical procedures may be subject to liability but not for commercial blockade. Although the Legislature may elect to constrain an HMO's right to approve and disapprove the provision of medical procedures, such a function is a lawful one for HMOs today. Twisting a faulty disapproval into a tort of commercial blockade strains the language of section

3427.1 beyond reason and need. We therefore reject appellant's construction of that statute.

Moreover, federal appellate authority holds that an action under California's commercial blockade statute is preempted by ERISA. (*Parrino v. FHP, Inc., supra,* 146 F.3d 699, 704-705.) We again agree with and follow that authority.

IV. Constitutional Issues

Appellant also contends that the trial court's interpretation of ERISA violates (1) the state's right to exercise its police powers under the Tenth Amendment of the United States Constitution, (2) appellant's rights of equal protection and due process, and (3) appellant's right to a jury trial. We disagree, as each of these contentions has been previously decided adversely to appellant's position.[6]

The Ninth Circuit in an analogous situation reviewed ERISA's preemption of California's Knox-Keene Health Care Service Plan Act of 1975. (Health & Saf. Code §§ 1340-1399.) The court held that in that context ERISA is a valid exercise of Congress's commerce power and does not violate the Tenth Amendment. (*Hewlett-Packard Co. v. Barnes* (9th Cir. 1978) 571 F.2d 502, 504.)

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[6] We reject CareAmerica's contention that appellant waived the constitutional rights arguments by failing to raise them in the trial court. He did at the hearing below touch upon the Tenth Amendment issue. As to the others, they are issues of constitutional law which we may reach even if appellant failed to raise them below.

Issues of deprivation of due process and equal protection of the laws were presented in *Kyle Railways v. Pacific Admin. Services* (9th Cir. 1993) 990 F.2d 513. The plaintiff claimed there that ERISA's preemption of state law causes of action violated those constitutional rights by failing to provide countervailing federal causes of action. The Ninth Circuit acknowledged that "ERISA has left a gap in the law. However, such 'a gap is legitimate if it is the result intended by Congress.' *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987). [Plaintiff] has failed to prove that Congress acted in an 'arbitrary and irrational' manner in adopting ERISA. *See Pension Benefit Guar. Corp.*, 467 U.S. at 729, 104 S.Ct. at 2717. Accordingly, we reject [plaintiff's] due process challenge." (*Id.* at p. 519.)

In *Spinelli v. Gaughan* (1993) 12 F.3d 853, the Ninth Circuit considered the question of ERISA's limitation of remedies and its preclusion of a jury trial. The court concluded that "Congress could properly limit [the plaintiff's] remedies under ERISA to those available in equity. Having done so, it created a right that is essentially equitable in nature. Therefore a jury trial was not required." (*Id.* at 858.)

Since we agree with the foregoing authorities, we reject appellant's claim that application of the ERISA preemption violates his constitutional rights.

V. Remaining Issues

Because we have concluded that ERISA preempts all of appellant's causes of action, we will not address the sufficiency of them.

DISPOSITION

The judgment (order dismissing the complaint) is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOREN, P.J.

We concur:

ZEBROWSKI, J.

MALLANO, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Second Appellate District, Division Two, No.
B120288
SO81868

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court
FILED
October 27, 1999
Robert Wandruff Clerk

_____
Deputy

_____

KENNETH ROSS,
Appellant
v.
CAREAMERICA HEALTH PLANS INCORPORATED, et al.,
Respondents

_____

Appellant's petition for review DENIED.
Mosk, J., is of the opinion the petition should be granted.

George
Chief Justice

California Civil Code § 1750. Citation

This title may be cited as the Consumers Legal Remedies Act.

California Civil Code § 1751. Waiver; public policy

Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.

California Civil Code § 1752. Cumulative remedies; class actions

The provisions of this title are not exclusive. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law. Nothing in this title shall limit any other statutory or any common law rights of the Attorney General or any other person to bring class actions. Class actions by consumers brought under the specific provisions of Chapter 3 (commencing with Section 1770) of this title shall be governed exclusively by the provisions of Chapter 4 (commencing with Section 1780); however, this shall not be construed so as to deprive a consumer of any statutory or common law right to bring a class action without resort to this title. If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the consumer may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such law.

California Civil Code § 1753. Partial invalidity

If any provision of this title or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the title and the application of such provision to other persons or circumstances shall not be affected thereby.

California Civil Code § 1754. Exemptions; structures

The provisions of this title shall not apply to any transaction which provides for the construction, sale, or construction and sale of an entire residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest therein, or for the sale of a lot or parcel of real property, including any site preparation incidental to such sale.

California Civil Code § 1755. Exemptions; advertising media

Nothing in this title shall apply to the owners or employees of any advertising medium, including, but not limited to, newspapers, magazines, broadcast stations, billboards and transit ads, by whom any advertisement in violation of this title is published or disseminated, unless it is established that such owners or employees had knowledge of the deceptive methods, acts or practices declared to be unlawful by Section 1770.

California Civil Code § 1756. Time of application of title

The substantive and procedural provisions of this title shall only apply to actions filed on or after January 1, 1971.

California Civil Code § 1760. Construction and application

This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

California Civil Code § 1761. Definitions

As used in this title:

(a) "Goods" means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not severable therefrom.

(b) "Services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.

(c) "Person" means an individual, partnership, corporation, limited liability company, association, or other group, however organized.

(d) "Consumer" means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.

(e) "Transaction" means an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.

(f) "Senior citizen" means a person who is 65 years of age or older.

(g) "Disabled person" means any person who has a physical or mental impairment which substantially limits one or more major life activities.

(1) As used in this subdivision, "physical or mental impairment" means any of the following:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; muscoloskeletal; [FN1] special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine.

(B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

(2) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(h) "Home solicitation" means any transaction made at the consumer's primary residence, except those transactions initiated by the consumer. A consumer response to an advertisement is not a home solicitation.

California Civil Code § 1770. List of proscribed practices

(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(1) Passing off goods or services as those of another.

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

(3) Misrepresenting the affiliation, connection, or association with, or certification by, another.

(4) Using deceptive representations or designations of geographic origin in connection with goods or services.

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.

(6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

(8) Disparaging the goods, services, or business of another by false or misleading representation of fact.

(9) Advertising goods or services with intent not to sell them as advertised.

(10) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

(11) Advertising furniture without clearly indicating that it is unassembled if that is the case.

(12) Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller.

(13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

(14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

(15) Representing that a part, replacement, or repair service is needed when it is not.

(16) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

(17) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.

(19) Inserting an unconscionable provision in the contract.

(20) Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (1) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (2) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product. This subdivision shall not apply to in-store advertising by businesses which are open only to members or cooperative organizations organized pursuant to Division 3 (commencing with Section 12000) of Title 1 of the Corporations Code where more than 50 percent of purchases are made at the specific price set forth in the advertisement.

(21) Selling or leasing goods in violation of Chapter 4 (commencing with Section 1797.8) of Title 1.7.

(22)(A) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

(B) This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient.

(23) The home solicitation, as defined in subdivision (h) of Section 1761, of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of either subsection (h) or (i) of Section 1639 of Title 15 of the United States Code or subsection (e) of Section 226.32 of Title 12 of the Code of Federal Regulations. A third party shall not be liable under this subdivision unless (1) there was an agency relationship between the party who engaged in home solicitation and the third party or (2) the third party had actual knowledge of, or participated in, the unfair or deceptive transaction. A third party who is a holder in due course under a home solicitation transaction shall not be liable under this subdivision.

(b)(1) It is an unfair or deceptive act or practice for a mortgage broker or lender, directly or indirectly, to use a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole or in part, by the residence of the borrower and which is used to finance a home improvement contract or any portion thereof. For purposes of this subdivision, "mortgage broker or lender" includes a finance lender licensed pursuant to the California Finance Lenders

Law (Division 9 (commencing with Section 22000) of the Financial Code), a residential mortgage lender licensed pursuant to the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000) of the Financial Code), or a real estate broker licensed under the Real Estate Law (Division 4 (commencing with Section 10000) of the Business and Professions Code).

(2) This section shall not be construed to either authorize or prohibit a home improvement contractor from referring a consumer to a mortgage broker or lender by this subdivision. However, a home improvement contractor may refer a consumer to a mortgage lender or broker if that referral does not violate Section 7157 of the Business and Professions Code or any other provision of law. A mortgage lender or broker may purchase an executed home improvement contract if that purchase does not violate Section 7157 of the Business and Professions Code or any other provision of law. Nothing in this paragraph shall have any effect on the application of Chapter 1 (commencing with Section 1801) of Title 2 to a home improvement transaction or the financing thereof.

California Civil Code § 1780. Consumer's action; relief; senior citizens or disabled persons; venue; court costs and attorney's fees

(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following:

(1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000).

(2) An order enjoining the methods, acts, or practices.

(3) Restitution of property.

(4) Punitive damages.

(5) Any other relief that the court deems proper.

(b) Any consumer who is a senior citizen or a disabled person, as defined in subdivisions (f) and (g) of Section 1761, as part of an action under subdivision (a), may seek and be awarded, in addition to the remedies specified therein, up to five thousand dollars ($5,000) where the trier of fact (1) finds that the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct, (2) makes an affirmative finding in regard to one or more of the factors set forth in subdivision (b) of Section 3345, and (3) finds that an additional award is appropriate. Judgment in a class action by senior citizens or disabled persons under Section 1781 may award each class member such an additional award where the trier of fact has made the foregoing findings.

(c) An action under subdivision (a) or (b) may be commenced in the county in which the person against whom it is brought resides, has his or her principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred.

If within the county there is a municipal court, having jurisdiction of the subject matter, established in the city and county or judicial district in which the

person against whom the action is brought resides, has his or her principal place of business, or is doing business, or in which the transaction or any substantial portion thereof occurred, then that court is the proper court for the trial of the action. Otherwise, any court in the county having jurisdiction of the subject matter is the proper court for the trial thereof.

In any action subject to the provisions of this section, concurrently with the filing of the complaint, the plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county or judicial district described in this section as a proper place for the trial of the action. If a plaintiff fails to file the affidavit required by this section, the court shall, upon its own motion or upon motion of any party, dismiss the action without prejudice.

(d) The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith.

California Civil Code § 1781. Consumer's class action; conditions; notices; judgment

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

(c) If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:

(1) A class action pursuant to subdivision (b) is proper.

(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.

(3) The action is without merit or there is no defense to the action.

A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a).

(d) If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve

notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.

(e) The notice required by subdivision (d) shall include the following:

(1) The court will exclude the member notified from the class if he so requests by a specified date.

(2) The judgment, whether favorable or not, will include all members who do not request exclusion.

(3) Any member who does not request exclusion, may, if he desires, enter an appearance through counsel.

(f) A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did not request exclusion.

(g) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The best possible notice of the judgment shall be given in such manner as the court directs to each member who was personally served with notice pursuant to subdivision (d) and did not request exclusion.

California Civil Code § 1782. Preliminary notices and demands; defenses; injunctive relief; evidence

(a) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of this title, the consumer shall do the following:

(1) Notify the person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 of the particular alleged violation of Section 1770.

(2) Demand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770.

Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within California, or, if neither w will effect actual notice, the office of the Secretary of the State of California.

(b) Except as provided in subdivision (c), no action for damages may be maintained under the provisions of Section 1790 if an appropriate correction, repair, replacement or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of such notice.

(c) No action for damages may be maintained under the provisions of Section 1781 upon a showing by a person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 that all of the following exist:

(1) All consumers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made.

(2) All consumers so identified have been notified that upon their request such person shall make the appropriate correction, repair, replacement or other remedy of the goods and services.

(3) The correction, repair, replacement or other remedy requested by such consumers has been, or, in a reasonable time, shall be, given.

(4) Such person has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage, in such methods, act, or practices.

(d) An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with the provisions of subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with the provisions of subdivision (a), the consumer may amend his complaint without leave of court to include a request for damages. The appropriate provisions of subdivision (b) or (c) shall be applicable if the complaint for injunctive relief is amended to request damages.

(e) Attempts to comply with the provisions of this section by a person receiving a demand shall be construed to be an offer to compromise and shall be inadmissible as evidence pursuant to Section 1152 of the Evidence Code; furthermore, such attempts to comply with a demand shall not be considered an

admission of engaging in an act or practice declared unlawful by Section 1770. Evidence of compliance or attempts to comply with the provisions of this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of this section.

California Civil Code § 1783. Limitation of actions

Any action brought under the specific provision of Section 1770 shall be commenced not more than three years from the date of the commission of such method, act, or practice.

California Civil Code § 1784. Damages, defense

No award of damages may be given in any action based on a method, act, or practice declared to be unlawful by Section 1770 if the person alleged to have employed or committed such method, act, or practice (a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services according to the provisions of subdivisions (b) and (c) of Section 1782.

28 U.S.C. § 1144

(a) Supersedure; effective date.

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate

to an employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.